SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1974 — No. 74-258

ALVIN E. YOUNG
CHARLES HARRIS
HAROLD E. YOUNG
HARVEY JOHNSON, *Petitioners*

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners, Alvin E. Young, Charles Harris, Harold E. Young, and Harvey Johnson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals entered in this proceeding on May 30, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals and opinions *sur* denial of motion for rehearing *en banc*, are not yet reported and appear in the appendix. The relevant portions of the opinion of the District Court for the Eastern District of Pennsylvania appears in the appendix and is reported at 368 F. Supp. 697 (E.D. Pa. 1973).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 30, 1974. A timely petition for rehearing *en banc* was denied on July 12, 1974. On July 24, 1974, upon petitioners' motion, the Honorable William J. Brennan, Jr., extended the time for petitioning for certiorari until September 10, 1974. This petition was timely filed. This Court's jurisdiction is now invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did not the lower court err in ruling that the Government's untimely sidebar revelation of known false testimony by its then excused key witness shifted the burden of curing the prosecutor's misconduct and correcting the misstatements to defendants who waived objection by failing to take sufficient remedial measures in the judgment of the circuit court?

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fed. R. Crim. P. 51.

Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

STATEMENT OF THE CASE

Linda Johnson was the key Government witness in this three week narcotics trial. Prior to trial, a discovery motion had been filed requesting:

> Disclosure of any agreement, understanding or communications made to (Linda) Johnson by any law enforcement agent concerning any benefit including leniency, concession or accommodations made to her, in consideration of her cooperation with the Government in this case or any related case.

Assistant United States Attorney Thomas McBride responded that:

> The Government declines to supply the information requested in Paragraph 2(d) . . . *for the reason that such matters are properly the subject of cross-examination of the witnesses* and is beyond the scope of proper discovery for the reason that it is not necessary for the preparation of any affirmative defense which the defendant might have (emphasis added).

During the second and third day of trial, Linda Johnson denied under cross-examination that she expected Government assistance at sentencing in her pending cases and insisted that she pleaded guilty on the advice of an anonymous public defender. The Assistant United States Attorney sat silently by and Ms. Johnson retired from the witness stand.

On the fourth day of trial, the next prosecution witness revealed that Ms. Johnson's guilty plea was entered on the advice of Mr. McBride and Special Assistant United States Attorney Taras Wochok. Within minutes, Mr. McBride requested a side bar conference.

> MR. McBRIDE: I wanted to have a side bar.
>
> THE COURT: What is the situation?

MR. McBRIDE: We have been over this ground time and time again. What happened is that those last three cases, *I didn't tell you*, have all been consolidated. Taras Wochok and I sat down and talked and we sat down and talked with her and *it was agreed that she should go and plead guilty and we would do anything, whatever we could, to influence the Court at the time of sentencing to give her a break for what she has been able to do.*

MR. MYERS: Why don't you say that.

MR. McBRIDE: I will stipulate to it.

MR. MYERS: No, I don't want to stipulate.

MR. ALESSANDRONI: Who agreed that she plead guilty?

MR. McBRIDE: I agreed.

* * * * *

THE COURT: My inclination is this: I *don't think you can expect these defendants to stipulate to something that is a strong point in their favor*, but I will say I don't think it has to be stretched out quite to much. I think you can get to the point clearly and promptly and unequivocally. I think with all due respect—and I am not critical of the manner in which you do it—but we are kind of going over things and quite frankly I am not sure it is getting clearer by going back and going over it. You do it the way you want. The subject matter I think is appropriate. I don't think anybody should have to submit to a stipulation, but I would like you to kind of move along.

* * * * *

I think in line with Mr. McBride's, *I will call it, revelation*, for lack of a better word, now, I will permit you to lead a little more than you ordinarily might, and you can lead, but really—

* * * * *

THE COURT:—I don't think you can ask them to stipulate. *I think they should get the jury impact and not just a bland stipulation.*

* * * * *

MR. CARROLL: I consider Mr. McBride's statement more than just a revelation; I think it is shocking. I understood the witness to say yesterday on the stand, that is, the woman, Johnson—and I am almost sure the language was—there were no understandings or agreements with the Government of any kind.

* * * * *

Now Mr. McBride's statement is contrary to that as I understand the statement just now. How she could have been permitted to testify—

THE COURT: What do you want me to do? Do you want me to send a letter to the Bar Association? What do you want me to do? It is shocking. If you want, I will talk to my mother about it. What do you want me to do when I go back in in ten minutes with the jury? I mean, it is demeaning for you to try to moralize with me about something that is shocking. Tell your law partners.

MR. CARROLL: The case law is clear the Government cannot sit by and allow a witness to perjure herself.

THE COURT: *If there is any kind of motion you have made, Mr. Carroll, it is denied* (N.T. 4-169-172) (emphasis added) (conclusion of disussion . . .)

Rather than "submit[ting] to a stipulation" and in an attempt to get "the jury impact and not just a bland stipulation," defense counsel proceeded to cross-examine Officer Beasley who admitted that Thomas McBride promised Linda Johnson—in the presence of Special Assistant United States Attorney Wochok—that for her cooperation, she would receive a suspended sentence in her open state cases.

(N.T. 4-177-178). However, he later recanted in part and indicated that at the conference she was told *only* that sentencing would be deferred (i.e. postponed) if she pleaded guilty (N.T. 4-182-183).

In a further attempt to get the jury impact of member of the prosecution team admitting that Linda Johnson was far less than candid when she repeatedly denied an understanding with McBride and Wochok, one defense counsel called Special Assistant United States Attorney Wochok in his case in chief. He purported to have no recollection of the conference or any promise to do everything possible to assist her at sentencing (N.T. 10-182, 186-187; 11-17-18).

All four petitioners were convicted of conspiracy to possess with intent to distribute and to distribute heroin in violation of 21 U.S.C. §846. Additionally, Charles Harris was convicted of possession of heroin with intent to distribute, 21 U.S.C. §841; Harold Young was convicted of aiding and abetting Charles Harris in the possession of heroin with intent to distribute, 21 U.S.C. §841 and 18 U.S.C. §2; Alvin Young was convicted of use of a telephone in facilitating the possession of heroin with intent to distribute by other defendants, 21 U.S.C. §§841, 843(b).

Their judgments of conviction were affirmed by the Court of Appeals. The Court ruled that the prosecutor's tardy disclosure and unaccepted offer to stipulate to his version of Ms. Johnson's relationship with his office shifted to the defense the burden of curing the prejudice and that by failing to take sufficient action, the defense waived the issue on appeal. Upon denial of motions for rehearing *en banc* three judges dissented and expressed the view that the panel's decision was inconsistent with *Napue v. Illinois*, 360 U.S. 264 (1959) and *Johnson v. Zerbst*, 304 U.S. 458 (1938).

REASONS FOR GRANTING THE WRIT

1. By placing the burden upon the accused to take curative action after tardy prosecution disclosure of the false testimony of its key witness, the decision below drastically limits the scope of a federal prosecutor's duty to correct his witness' known misstatements and elicit the truth and thereby conflicts with the principles of *Napue v. Illinois*, 360 U. S. 264 (1959) creating an important question of federal law which should be reviewed by this Court.

In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court ruled that prosecution misconduct of actively presenting false evidence was inconsistent with the concept of a fair trial and constituted a denial of due process of law. In *Pyle v. Kansas*, 317 U.S. 213, 216 (1942), this Court reaffirmed and broadened this principle proscribing the knowing use of perjured testimony and "deliberate suppression" of evidence favorable to the accused. In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), this Court ruled that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Quoting with approval from the "similar" case of *People v. Savvides* 1 N.Y. 2d 554, 557, 136 NE 2d 853, 854-855, 154 N.Y.S. 2d 885, 887 (1956) (Fuld J.), Chief Justice Warren wrote

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what the subject, and if it is in any way relevant to this case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.* . . . That the district attorney's silence was not the result of guile or a design to prejudice matters little, for its impact was the same preventing, as it did, a trial that could in any sense be termed fair (emphasis added).

Elsewhere in his opinion, *People v. Savvides* 1 N.Y. 2d at 556, 136 N.E. 2d at 854, 154 N.Y.S. at 887, Judge Fuld explicitly described the procedures to be followed by a prosecutor immediately upon discovery of his witness' deception.

> The prosecutor should have corrected the trial testimony given by Mantzinos and the impression it created. He should have, by immediate statement of his own or by further appropriate examination of Mantzinos, forthrightly exposed the lie, so that the court and jury would have known that the witness had reason to expect lenient treatment.

The Assistant United States Attorney consciously failed to conduct himself in accordance with these principles. His untimely offer to stipulate that his key witness was not candid in denying promised Government assistance for her testimony simply was not "correct[ing] what he knows to be false and eliciting the truth." He did not "by immediate statement of his own or by further appropriate examination forthrightly expose the lie so that the court and jury would have known that the witness had reason to expect lenient treatment."

By the time the slightest disclosure was made, Ms. Johnson had left the witness stand and was free of the pressure of her intense cross-examination described by Professor Wigmore as the greatest legal engine ever devised for the discovery of the truth. Were she promptly confronted with the truth concerning agreements, understandings and offers of assistance made by Thomas McBride, who can tell what other testimony she may have recanted in that heat of cross-examination? When its witnesses make gross misstatements or perjure themselves, as in the instant case, *Napue* requires nothing less than prompt, timely revelation of the truth to the fact finder, rather than waiting for a later time to make the disclosure in a manner calculated to be the least damaging to the prosecution. Any other course of action denies those accused of taking full advantage of the Sixth Amendment right to confront prosecution witnesses.

However, the Court of Appeals ruled, in effect, that by his tardy action the prosecutor shifted the burden of curing his own misconduct to the defense. "Counsel by various defense tactics *possibly* could have succeeded in so reducing the prejudice to their clients." (Appendix 24a) (emphasis added)*

This Court should grant certiorari in order to resolve the conflict in principle between the decision below and *Napue*. This Court should review the instant case in order to clarify the scope of the prosecutor's duty upon discovery of his witness' testimonial misrepresentation.

The prosecution witness who testifies while enmeshed in his own criminal defense is a frequent figure in today's courtroom. Due process of law and the ethical standards of our profession require prosecutors to advise the factfinder immediately when such a witness misrepresents a special relationship he enjoys with the prosecution. Although this principle is implicit in *Napue*, the decision below drastically reduces the prosecutor's duty by permitting prosecutors to delay action until the witness has retired and requiring defense counsel at his peril to agree to the prosecutor's offer to stipulate to the Government's explanation of that relationship. The notion that defense counsel is bound to join in such stipulation or assume the burden of curing the prejudice created by prosecution misconduct is an unfortunate throwback to the sporting theory of justice. In his dissent *sur* denial of petitions for rehearing *en banc*, Chief Judge Collins Seitz poignantly observed that "[t]he solution reached by the panel encourages game playing by government attorneys. . . ." (Appendix 30a). Shall the prosecutor's duty be prompt unstinting disclosure to the factfinder when his witness lies, or shall prosecutors be tempted to follow the pattern of conduct knowing that it may produce some criticism but not

*The possible defense tactics alluded to could hardly have been exercised during the Government's case-in-chief. This theory of the Court of Appeals requires counsel for the accused to agree to stipulate the Government's version of the misstatement or to put on a defense case in chief.

reversible error? Shall the lie be exposed to the factfinder then and there by prosecution disclosure and defense cross examination before it infects the collective mind of the jury or shall prosecutors be able to force defense counsel to accept a belated stipulation to a Government version of the misstatement after the witness has retired? The "concern with the all too frequent complaints of improper conduct by government attorneys" *United States v. Holloway*, — F.2d — (3rd Cir. August 26, 1974), will be better resolved by bolstering the teaching of *Napue*, rather than permitting the judgment of the Court of Appeals to go unreviewed. Lest the conduct of the Government attorney in this case become a pattern for other prosecutors who dare to accept mild professional rebuke while avoiding reversible error, this Court should grant certiorari.

2. By requiring the defense to cure the prejudice of prosecution misconduct upon pain of waiver, the decision below denied due process of law and adopted a concept of preservation of error foreign to Fed. R. Crim. P. 51 and the decisions of this Court and other courts of appeals creating an important question of federal law which should be reviewed by this Court.

The fundamental issue presented to the courts below was that petitioners had been denied a fair trial by the Government's knowing use of false testimony and the failure to correct such testimony in a timely manner.

The Court of Appeals declined to reach the merits of this contention. Instead, the panel of the Court held that the defense had "waived" the right to allege this error because of the "inactivity" of the defense in taking measures to cure the prosecutorial misconduct. The panel found that the prosecution had been aware that its key witness had testified falsely concerning whether any promises had been made to her in consideration of her testimony; that this false testimony prejudiced the defense and that the disclosure by the prosecution of the falsity

of its witness' testimony was untimely. However, the panel reasoned that error could not be assigned by the defense unless some action was taken to "reduce" the prejudice. The essence of the panel's reasoning is found in the following passages from its opinion:

> We believe that this inactivity by defense counsel following the "revelation" by the Government constitutes a waiver of their right to allege error on appeal . . . This is not to say that counsel, had they exercised their best efforts, would in all certainty have been able to minimize the prejudice to defendants to such a degree that reversible error could have been eliminated. We recognize the strategic importance to defense counsel of being able to impeach the credibility of a key Government witness while he is still on the stand, rather than by recalling him after the jury has possibly accepted the truthfulness of his statements. We are unable to say, however, that there is *nothing* that defense counsel could have done to overcome or reduce the alleged prejudice so as to secure a fair trial for their clients. Counsel by various defense tactics possibly could have succeeded in so reducing the prejudice to their clients. Had they taken these steps, we would now be in a position to evaluate the presence, if any, of the residual prejudice and its effect upon the fairness of the trial. Absent such effort, we conclude that defendants waived their objections to the possible prejudice from the Government's action. (Appendix 22a-24a)

On petition for rehearing, Judge Rosenn, writing in opposition to the granting of a rehearing by the Court *en banc*, appeared to address himself to the merits of petitioners' claims by suggesting that a proffered stipulation by the Government constituted a "correction" of the false testimony. However, this position, apart from whether it is correct, was not taken by the three judge panel on the direct appeal. Rather, they would not address the merits

of petitioners' contention because of waiver. Three judges, including Chief Judge Seitz, dissented from the denial of rehearing and, would have reversed and remanded for a new trial.

The decision of the panel misconceived the nature of "waiver" and the applicability of that doctrine to the present case. The panel opinion cited in support of its position several circuit court cases dealing with a variety of situations arising under Fed. R. Crim. P. 30 and 52 concerning failures to except to erroneous jury instructions and to object to erroneous trial rulings. e.g., *United States v. Chicarelli*, 445 F.2d 1111, 1116 (3d Cir. 1971) (failure to object to instructions by trial judge to jury); *United States v. Grosso*, 358 F.2d 154, 158 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968) (failure to object to trial judge's method of conveying supplemental instruction to jury); *United States v. Cerone*, 452 F.2d 274 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972) (failure to enter objection to testimony and failure to cross-examine about the offensive testimony). The instant case is materially different. The panel opinion noted that after the Government's disclosure of the false testimony, defense counsel protested the failure of the Government to correct the witness' false testimony while she was on the stand and the trial judge stated, "If there is any kind of motion you have made . . . it is denied." On petition for rehearing, Judge Seitz, dissenting, found that the trial judge's statement may be viewed as "effectively foreclosing any means by which defendants, without a considerable lapse of time and possible significant injury to the presentation of their case, could have corrected this error" (Appendix 28a). In any event, it has not been contended that the defense did not object to the prosecution's action; rather, the issue as framed by the panel opinion was whether the defense had a further duty to remedy the error, on pain of waiving appellate review.

The panel's decision is a radical departure from existing federal law. Preservation of trial error for review on

appeal has always been governed by Rule 51 of the Federal Rules of Criminal Procedure. With the abolition of "exceptions," an "objection" has always been regarded as sufficient to enable a defendant to obtain appellate review of claimed error. See, Wright, Federal Practice and Procedure, §§841-843 (1969). By embarking onto the perilous waters of obligating the defense to "remedy" error, the panel decision puts a monumental and uncertain burden on criminal defendants.

The true meaning of the panel decision would require the defense to have presented a case in chief. This would have been the only practical avenue open to petitioners to have "remedied" the prosecutor's misconduct. No case has been found placing such a burden on a defendant and, such a burden is at odds with the well established doctrine that no inference adverse to the defense may be drawn from the failure to present a defense.

At the heart of the problem is the panel's use of an erroneous standard of waiver. The panel decision indicates that there were various defense tactics that "possibly could have succeeded in so reducing the prejudice." This standard, unknown in any case involving waiver of fundamental constitutional rights, is uncertain and seems to imply that if there is a "possibility" that the defense could have done something to correct the prosecutor's conduct then the error is deemed waived. But a "possibility" exists of doing almost anything and this is an inappropriate standard to judge whether petitioners waived the right to a fair trial.

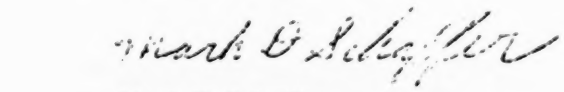
As pointed out by Judge Seitz, the proper standard in this context derives from *Johnson v. Zerbst*, 304 U.S. 458 (1938). See also *Brady v. United States*, 397 U.S. 742 (1970); *Brookhart v. Janis*, 384 U.S. 1 (1966). Petitioners claim that the prosecutor's misconduct violated due process of law and deprived them of a fair trial. Waiver of a defendant's right to a fair trial should not be lightly presumed and there is no indication in the record below that there was a deliberate relinquishment of the right

to appellate review of an important constitutional issue. This court should grant certiorari in order to eliminate the confusion created by the decision below with respect to what defense counsel must do to preserve the error of prosecution misconduct for review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,



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United States of America
v.
Alvin E. Young et al.

Crim. Nos. 73-45, 73-193.

United States District Court,
E. D. Pennsylvania.
Oct. 26, 1973.

* * *

MEMORANDUM OPINION

BECHTLE, District Judge.

All of the above defendants, except James H. Simmons,[1] were tried on the two indictments consolidated for trial charging violations of various of the narcotic laws of the United States and, after three weeks of trial, were found guilty by the jury on each count that was permitted to go to the jury.[2]

* * *

---

1. Defendant James H. Simmons was severed and is to be tried at a later date. The circumstances supporting the Court's Order of severance are covered in other parts of the Court's Opinion.

2. Count III of indictment number 73-193 was withdrawn from the jury when the Court granted the motion of Alvin E. Young for a judgment of acquittal on the ground that the Government had failed to meet its burden of proof that Alvin Young was guilty of being a principal in a continuing criminal enterprise in violation of Title 21 U.S.C., §848.

HISTORY OF THE CASE

* * *

The Government's principal evidence consisted of the testimony of Linda Johnson, an informant and also an unindicted co-conspirator; a real estate agent from Willingboro, New Jersey; several Philadelphia Police Officers and agents of the BNDD, all assigned to the Office of Drug Abuse and Law Enforcement (ODALE); six telephone conversations, intercepted in accordance with the Court-appointed electronic surveillance; and, 14,000 bags of heroin seized from a 1966 black Oldsmobile. There were also several stipulations, including the stipulation that the 14,000 bags that were seized in fact contained heroin and that 15 calls were made from a telephone registered to Alvin E. Young to the Hotel Dash on Lenox Avenue in the City of New York during June and July of 1972. The informant witness, Linda Johnson, testified that she first met Alvin E. Young in April, 1972. She and Alvin E. Young, together with all of the defendants, had on four or six occasions driven to the City of New York for the purpose of purchasing large quantities of loose heroin. She indicated that on one occasion in August of 1972 she drove to New York with these men and, when they arrived there, Alvin E. Young handed her $72,000 in a package which she took with her when she and Alvin E. Young went into the Dash Hotel. The money was counted in her presence and used to purchase two kilos of heroin, which Linda Johnson placed in a large pocketbook. She was thereafter told by Alvin E. Young to return to Philadelphia on a bus in the company of defendant Robert Green. She testified she made two or three such trips and on each occasion, on return to Philadelphia, she would visit a different house where all of the defendants and other unidentified persons would meet for the purpose of adulterating, cutting, bagging, packaging, and readying the heroin for sale and distribution in small glassine bags.

She testified that, during this period of time and for several years before, she had been befriended by Philadelphia Police Officer Grant Beasley who was on the Philadelphia Police Department Narcotics Squad and who sought and received information from her from time to time on a regular basis in respect to criminal activities, including narcotics sales, for which she was paid money by Officer Beasley.

On January 2, 1973, while Officer Beasley was in Linda Johnson's home, he listened in on a call, with Linda Johnson's permission, between her and Alvin E. Young. The substance of the call was to ask if "Sonny" (defendant Harvey Johnson) was there and to ask if Linda Johnson's car could be used the next day, January 3, 1973, for a delivery of narcotics. Officer Beasley reported this overhear to his superiors at ODALE and a ten-man surveillance team was thereafter formed to meet the following morning at 7:00 a.m. to begin surveillance near Linda Johnson's home on North Philip Street.

At 7:00 a.m. on January 3, 1973, ten agents, operating under the authority of Chief Investigator Edward R. Cassidy of the BNDD, assembled at the headquarters of ODALE at 308 Walnut Street, Philadelphia, Pennsylvania, for the purpose of preparing a surveillance plan to take place in the several blocks surrounding the vicinity of premises 2119 North Philip Street, Philadelphia, the residence of Linda Johnson. The ten officers were from the Philadelphia Police Department and assigned to ODALE, in keeping with a joint Federal-state drug law enforcement program approved by the United States Congress, accepted by the state and executed under Federal supervision. Each of five unmarked, civilian-type automobiles containing two officers were scattered in the vicinity at five prearranged locations, each with radio communication capability to and from each other. The primary object of the surveillance was a 1966 black Oldsmobile which was seen in the vicinity by several of the surveillance officers. Defendants Charles Harris and

Harvey Johnson were also seen individually at separate nearby locations during the one-hour surveillance.

The 1966 black Oldsmobile left the vicinity, but could not be followed by any of the surveillance vehicles due to heavy traffic. The surveillance vehicles were then directed by Agent Cassidy to leave the area and go to the community of Willingboro, New Jersey (approximately 25 miles distant), and assume prearranged surveillance positions at two residences in that community, to wit, 98 Manor Lane and 4 Tempest Lane, properties which Alvin E. Young was believed to have either a residence or an ownership interest in. The agents who went to the Tempest Lane address were satisfied that there was no activity of any kind there, and they joined the other agents who had concentrated their efforts in and about the vicinity of 98 Manor Lane. Chief Investigator Cassidy and Sergeant William Baron of the Philadelphia Police Department, occupying one car, drove past 98 Manor Lane and, in doing so, passed by Alvin E. Young and another unidentified male who were standing in the street. The officers assumed a surveillance post while seated in their car at a point some 250 feet away and beyond certain other properties containing shrubbery where, with the use of field glasses, the front of premises 98 Manor Lane was visible. In such position, they saw the following events:

(1) Charles Harris, Harold E. Young, and an unidentified Negro male left the house about 11:00 a.m.

(2) Charles Harris walked to a yellow vehicle parked on Manor Lane, opened the trunk and reached in, bent over and walked in such a manner as permitted the surveillors to conclude that he had an object in his hands, although they did not see the object. He went to the 1966 black Oldsmobile which was the same one that had been under surveillance earlier near 2119 North Philip Street, Philadelphia, and he appeared to place the object in the trunk of that car.

(3) The 1966 black Oldsmobile, driven by Charles Harris, left and was followed by a 1967 Pontiac driven by defendant Harold E. Young. The surveillance team followed. The defendants' cars proceeded south on New Jersey Route 130, which parallels the Delaware River, crossed the Tacony-Palmyra Bridge into Philadelphia, and proceeded over Levick Street, down Roosevelt Boulevard to the ultimate destination at 15th and Louden Streets, where both of the automobiles came to a parked position a short distance apart. Both drivers left their vehicles and waited on the sidewalk. During this period of travel, the five Government vehicles, alternating their surveillance positions, closely followed those vehicles over the entire route to the place where both vehicles stopped.

During the trip from Willingboro, New Jersey, the black Oldsmobile and the Pontiac followed each other closely, with the black Oldsmobile always in front. On one occasion, the two vehicles stopped at a gas station and Charles Harris was seen leaving the black Oldsmobile and walking back to the Pontiac to converse with the driver of the Pontiac, Harold E. Young. On two other occasions, when the black Oldsmobile barely made a green light, is proceeded through the intersection, stopped on the other side, and waited until the Pontiac was able to proceed with the next green light.

Charles Harris and Harold E. Young were arrested on the sidewalk at 15th and Louden Streets. Charles Harris stated to arresting officers that he did not know anything about the 1966 Oldsmobile in that he had "arrived at the scene in a taxi cab."

Other than the foregoing, neither of these two defendants made a statement. They were taken to ODALE headquarters, given their warnings, and thereafter at 5:30 p.m. a search warrant for both vehicles was prepared and executed before Judge John J. Poserino, a State Court Judge presiding for such purposes at 5:30 p.m. at the Philadelphia Police Administration Building. At 7:30

p.m. that evening, both cars were searched. Found in the trunk of the Oldsmobile were 14,000 bags of white substance which the defendants later stipulated was heroin.

On January 23, 1973, the Federal Grand Jury returned indictment number 73-45 against Charles Harris and Harold E. Young, charging Charles Harris in Count 1 of possessing a controlled substance (heroin) for purposes of distribution or sale, in violation of 21 U.S.C. §841. Count II of that indictment charged Harold E. Young with aiding and abetting Charles Harris in possessing the controlled substance with the intention of sale and distribution.

On April 3, 1973, the second indictment (number 73-193) was returned by the Federal Grand Jury, and it contained three counts. The first count charged the two defendants already under indictment, together with four others, with a conspiracy to possess with intent to deal and to distribute quantities of heroin, in violation of 21 U.S.C. §841. The second and third counts of this second indictment were against Alvin E. Young only and charged him in Count II with the use of a telephone in connection with a drug transaction (21 U.S.C. §843(b)) and in Count III with being a principal in a continuing criminal enterprise involving narcotics (in violation of 21 U.S.C. §848).

The charges relating to heroin possession contained in the earlier indictment against Charles Harris and Harold E. Young were also set forth in the conspiracy count of the second indictment as an overt act.

The Government authenticated electronic surveillance by introducing the record of the Court Order and its approval by the Honorable J. William Ditter, Jr., and also produced as identifying witnesses Linda Johnson and Officer Grant Beasley, who both had previously heard Alvin E. Young and Harold E. Young talk in person and on the telephone. Both of these witnesses had indicated that they had talked to Alvin E. Young and that they had listened to the tapes and that, in their opinion, the voices were of

Alvin E. Young or Harold E. Young and, in some instances, unidentified. They compared the tapes that they had heard with typed transcripts prepared by the Government from the tapes, and the witnesses then testified that the designation on the transcripts of various statements made by either Alvin E. Young or Harold E. Young was an accurate representation of what each of those persons had stated on the tapes. Both identifying witnesses testified they had never seen the transcripts before but identified the voices on the basis of their ability to perceive the sound and quality of the taped voices with the actual voices of these two defendants that they had previously come to know. The tapes were played for the jury under the instructions that they were to consider the voices they heard on the tapes as the evidence and not the transcripts that were simply to be used as a guide by the jury in following the tapes. The calls indicated that Alvin E. and Harold E. Young spoke several times, and Alvin E. Young had spoken to unidentified persons several times. In summary, the incriminating excerpts from the telephone calls could be summarized by stating that Alvin E. Young indicated soon after the tap was authorized that he knew he was being wiretapped; he referred to the use of "b's," to which the Government produced expert testimony that this term in the narcotics trade meant "bundles" which, in turn, had been described as a term used for a package of 25 glassine bags of heroin. There was also a reference to the fact that Alvin E. Young realized he was being followed by Federal narcotics agents; several other common references in the narcotics trade were used by Alvin E. and Harold E. Young, and there were excerpts of episodes of conversation where intelligible words and phrases were used by Alvin E. Young but which were responded to by Harold E. Young in intentionally formed but unintelligible responses that were sufficiently loud and clear to justify the jury in concluding that the responses were in a form of code language. There were excerpts to the effect that certain "people got busted with

56 'b's' " which was offered to show that Alvin E. Young's knowledge that 56 "bundles" of heroin were found on persons arrested.[4]

None of the defendants took the stand in their own behalf. Some of the defendants offered evidence; others did not. Defendant Robert Green offered as a witness the stepmother of Linda Johnson, who testified as to the events surrounding a charge of assault with intent to kill and aggravated assault and battery that had been made against Linda Johnson during an altercation in the stepmother's home in 1972. He also called Assistant District Attorney Taras Wochok, Esq., who was the Philadelphia County equivalent of the Assistant United States Attorney functioning on the state side of the joint Federal-state law enforcement team operating under ODALE. Defendant Harold E. Young produced hospital record evidence concerning Linda Johnson's hospitalization for drug addiction; Harold Joseph, a commercial photographer, who testified that he had taken certain pictures on June 11, 1973, in the presence of Mr. Yermish, his attorney, at premises 98 Manor Lane; and Professor Korbobo, who testified that it was his opinion from observing the photographs and identifying the various types of shrubbery that certain of those plantings, between the premises 98 Manor Lane and the point where the surveillance agents testified they observed certain events, were of the species that would have made visibility difficult if not impossible on January 3, 1973. Charles Harris called two Philadelphia detectives who testified as to their experience with Linda Johnson as a police informant. Neither Alvin E. Young nor defendant Harvey Johnson offered any evidence.

The principal thrust of all defendants was to destroy the credibility of the Government's witnesses and primarily

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4. Prior to the introduction of any electronic surveillance evidence, the Court held a hearing outside the presence of the jury at which all defendants and all counsel were present. The results of that hearing was that the Court reduced the calls to be permitted into evidence to six. See, N.T. pp. 9-3 to 9-59.

Linda Johnson. The cross-examination of the Government's witnesses was extensive in this respect. The defense showed that Linda Johnson for a number of years had been a narcotic addict, a heroin addict, a prostitute, an informant, a person who had 14 or 15 arrests, and who was testifying because she expected to receive lenient treatment or recommendations of lenient treatment for her convictions from a State Court sentence. Defendant suggested that her previous ability to stay out of jail was a direct consequence of her being an informant for law enforcement officials and that law enforcement persons were responsible for her narcotic addiction and that she was dependent upon them and, therefore, was inclined to lie. Defense also attempted to show that Officer Grant Beasley similarly was inaccurate in his testimony, was unreliable, and was in collaboration with Linda Johnson in furnishing false testimony.

The jury disagreed with the defendants' theories and concluded that the Government had made out its case beyond a reasonable doubt against all defendants and returned a guilty verdict on all counts accordingly.

* * *

BIASED WITNESS

Defendants submit that the failure of the Government to correct the testimony of Linda Johnson that she had not been promised anything in return for her testimony, when in fact this was false, constitutes a substantial ground for a new trial. Testimony adduced at trial revealed that Miss Johnson had pleaded guilty before Judge Zaleski in Philadelphia Court of Common Pleas to one count of assault with intent to kill and two counts of unlawful possession of narcotics, but that sentencing on these three charges had been deferred pending completion of the witness' testifying in the instant case. In an attempt to establish that the witness had received from the Government a promise of consideration in regard to the pending State Court charges

in return for her testimony here, defense counsel propounded the following two questions:

* * * * *

"Q. Now, have you been promised by anyone other than the public defender that you would receive favorable treatment from the court in these three cases because you are in fact cooperating with the police and the Federal authorities?

A. No.

Q. Is it your testimony that you have not been promised any help in your pending cases by the Government, by the United States Attorney, or by the police?

A. No, the regular cops that I know, they told me they would help me as much as possible, but not because of this case, because I don't think they even know of this case." (N.T. p. 2-128.)

* * * * *

While the witness' response to the second of the above two questions was apparently her unsophisticated understanding of how she expected to be helped, it was not in complete accord with the Government's understanding of its obligations. The Government had agreed to advise the appropriate state authorities of Miss Johnson's cooperation in this matter. This fact was made known to all defense counsel. At a sidebar conference held subsequent to the testimony of Linda Johnson, the Assistant United States Attorney stated:

> "[Assistant District Attorney] Taras Wochok and I sat down and talked and we sat down and talked with her and it was agreed that she should go and plead guilty and we would do anything, whatever we could, to influence the Court at the time of sentencing to give her a break for what she has been able to do." (N.T. p. 4-169.)

[13] This Court did not feel then, nor does it now, that Linda Johnson knowingly and intentionally testified falsely in response to the questions of defense counsel. As far as she was concerned, the Government had "agreed" to make known to the sentencing judge the fact of her cooperation in this matter. It is not unreasonable to expect that this uneducated female witness, whose life had been threatened and who had been subjected to extensive questioning, and whose home had been ransacked, would not adopt the precise nomenclature defense counsel would have preferred in describing what she hoped would be the Government's response to her cooperation.

[14] Equally unavailing is defendants' assertion that the Government failed to correct the testimony of Linda Johnson. As discussed previously, defense counsel were apprised of the aforesaid agreement between the Assistant United States Attorney, the Assistant District Attorney, and Linda Johnson during the course of a sidebar conference subsequent to the witness' departure from the witness stand. Linda Johnson was subject to extensive cross-examination and to recall at any time by defense counsel for the purpose of exploring this alleged agreement and bringing same to the attention of the jury.

Reliance by defense counsel on the case of Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), is misplaced. In *Giglio*, the Government failed to disclose a promise of lenience made to its key witness in return for his testimony, even after the witness testified at trial that no promises of lenience were made to him. We are not faced here with the Government's failure to disclose such material evidence.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-2040, 73-2041

UNITED STATES OF AMERICA

v.

CHARLES HARRIS and HAROLD YOUNG

HAROLD E. YOUNG, *Appellant in No. 73-2040*

CHARLES HARRIS, *Appellant in No. 73-2041*

(D.C. Crim. No. 73-45)

Nos. 73-2042
73-2043
73-2045
73-2046

UNITED STATES OF AMERICA

v.

ALVIN E. YOUNG, HARVEY JOHNSON, ROBERT GREEN, CHARLES HARRIS, HAROLD E. YOUNG, and JAMES H. SIMMONS

Harvey Johnson,
Appellant in No. 73-2042
Alvin E. Young,
Appellant in No. 73-2043
Harold E. Young,
Appellant in No. 73-2045
Charles Harris,
Appellant in No. 73-2046

(D.C. Crim. No. 73-193)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 16, 1974

Before Biggs, Aldisert and Rosenn, *Circuit Judges*

Thomas C. Carroll, Esquire
Attorney for Appellant in No. 73-2042
Paul Yermish, Esquire
Attorney for Appellants in No. 73-2040 and No. 73-2043 and No. 73-2045
Joseph Alessandroni, Jr., Esquire
Attorney for Appellant in No. 73-2041 and No. 73-2046
Thomas J. McBride, Esquire
Attorney for Appellee

OPINION OF THE COURT

(Filed May 30, 1974)

Rosenn, *Circuit Judge*

This opinion disposes of the appeals of four defendants who were convicted, in a consolidated trial also involving one other defendant,[1] of various violations of the narcotics

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1. We review in this opinion the convictions of Charles Harris, Alvin Young, Harold Young, and Harvey Johnson. The appeal of Robert Green, who was also convicted in the district court, raises a distinct issue and is still pending before this court. James Simmons, whose trial was severed from that of the remaining defendants, is not before us on this appeal.

laws.[2] The facts of the case are comprehensively set forth in the opinion of the district court denying all of defendants' post-trial motions, 368 F. Supp. 697 (E.D. Pa. 1973), and we repeat only those facts necessary to our disposition of these appeals.

The primary contention of the defendants is that they are entitled to new trials because the Government failed to take timely action to correct false testimony of its key witness, Linda Johnson, concerning promises made to her by the Government in exchange for her testimony. Although we agree that the Government's action in this case was improper, we believe that defense counsel waived their objections to the impropriety by consciously failing to take any steps to minimize the resulting prejudice to their clients. We therefore affirm the convictions at issue on this appeal.

The Government's case relied heavily upon the testimony of Linda Johnson (unrelated to defendant Harvey Johnson), an informant and unindicted co-conspirator, who testified under immunity. As noted by the district court, none of the defendants took the stand and "[t]he principal thrust of all defendants was to destroy the credibility of the Government's witnesses and primarily Linda Johnson." 368 F. Supp. at 703. In furtherance of this objective, counsel for the defendants made vigorous efforts to show that Ms. Johnson had been induced to testify for the Government in return for its promise to help her get a reduced sentence on three counts of a state prosecution to which she had

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2. All four defendants were convicted of conspiracy to possess with intent to distribute and to distribute heroin in violation of 21 U.S.C. §846. Additionally, Charles Harris was convicted of possession of heroin with intent to distribute, 21 U.S.C. §841; Harold Young was convicted of aiding and abetting Charles Harris in the possession of heroin with intent to distribute, 21 U.S.C. §841 and 18 U.S.C. §2; Alvin Young was convicted of use of a telephone in facilitating the possession of heroin with intent to distribute by other defendants, 21 U.S.C. §§841, 843(b).

previously pled guilty but had not yet been sentenced. The record discloses the following fruits of this effort.[3]

When testimony began on the second day of trial, Ms. Johnson was the first witness. Defense counsel established that she had recently pleaded guilty in state court to assault with intent to kill, possession of heroin with intent to deliver, and possession of narcotics, but that she had not yet been sentenced on these counts. She then denied that the Government had promised her that she "would receive favorable treatment from the [state] court" because of her cooperation with the federal authorities, and she denied that she had been "promised any help" in the state proceeding by the Government.[4]

On further cross-examination the following day, she stated that she had no "agreement with the . . . U.S. Attorney's office as to what would happen in [her] case," and she stated that she did not expect anyone from the

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3. Defendant Harvey Johnson made a pre-trial motion for discovery of any "agreement, understanding or communications made to [Linda] Johnson by any law enforcement agent concerning any benefit, including leniency, concessions or accommodations made to her, in consideration of her cooperation with the Government in this case or any related case."

The Government responded by refusing to supply this information "for the reason that such matters are properly the subject of cross-examination of the witnesses. . . ."

The district court denied the motion, and this decision is not contested on appeal.

4. On cross-examination, Linda Johnson testified as follows:

Q. Now, have you been promised by anyone other than the public defender that you would receive favorable treatment from the court in these three cases because you are in fact cooperating with the police and the federal authorities?

A. No.

Q. Is it your testimony that you have not been promised any help in your pending cases by the Government, by the United States Attorney, or by the police?

A. No, the regular cops that I know, they told me they would help me as much as possible, but not because of this case, because I don't think they even know of this case.

office to appear at her state court sentencing.[5] When counsel for the defense asked her if she had any "agreements or understandings" with the federal authorities with regard to her testimony, the Government counsel first objected on the grounds that the question was "entirely too broad," and then remained silent when the objection was overruled and Ms. Johnson answered in the negative.[6]

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5. Ms. Johnson further testified:

Q. Now, did you have any agreement with the Marshals or the U.S. Attorney's office as to what would happen in your case?

A. No.

Q. As long as you testified?

A. No.

Q. You have no idea what your sentence will be?

A. No. I haven't even been told I might be sent away.

Q. Do you expect anybody to appear in court on your behalf and testify as to why you shouldn't go to jail?

A. I would like someone to, but if they didn't, that would be all right, too.

Q. You don't expect Mr. McBride or any of his associates to appear in [State] Court, do you?

A. No.

Q. Did any law enforcement agent including a police officer or detective state to you that, "When your case comes up, don't worry about it; we will take care of it"?

A. No.

6. Ms. Johnson testified:

Q. All right. Do you have any *agreements or understanding* with the Federal authorities with regard to your testimony today?

* * * * *

Mr. McBride: I object to that, sir, on two grounds:

One, I think she has answered it about a half a dozen times already and I think Mr. Meyers has asked it.

But Number 2, if the Court does feel it should be answered again, I would ask that Mr. Meyers narrow it down. As it stands now, *it is entirely too broad.* "Any understandings or agreements" could encompass a myriad of things to her.

The Court: Well, *that's Mr. Meyers' point. He wants to find that out.* I think it is a little repetitious but I will permit her to answer at this time.

* * * * *

On the following day, the fourth day of trial, Officer Beasley testified. He was the police department "contact" with Ms. Johnson. He testified that Mr. McBride, who was the Assistant United States Attorney trying this case, and Mr. Wochok, who was simultaneously serving as Assistant United States Attorney and Assistant District Attorney for Philadelphia, had advised Ms. Johnson to plead guilty to the state charges. Under persistent questioning, however, he refused to state that the two officials had promised to intercede in the state proceeding in exchange for her testimony in the instant case.

At that point, Mr. McBride requested a conference at side-bar. He told the court and counsel for the defense that

> Taras Wochok and I sat down and talked and we sat down and talked with her and it was agreed that she should go and plead guilty and *we would do anything, whatever we could*, to influence the [state] court at the time of sentencing to give her a break for what she has been able to do. [Emphasis supplied.]

Mr. McBride offered to stipulate to this, but the district court, agreeing with defense counsel, stated that "I don't think you can expect these defendants to stipulate to something that is a strong point in their favor, but . . . I think you can get to the point clearly and promptly and unequivocally." The court also stated that in light of what it termed Mr. McBride's "revelation," it would permit defense counsel to lead witnesses more than they usually might. When defense counsel stated that the Government's conduct was outrageous in not correcting Linda Johnson's testimony concerning the agreement while she was on the

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A. No.

* * * * *

Q. Do you have any agreements or understandings with anyone in the State Government, State authorities [relative to your testimony in court today]?

* * * * *

A. No.

[Emphasis supplied.]

stand, the court stated, "If there is any kind of motion you have made, Mr. Carroll, it is denied."

A convicted defendant is entitled to a new trial if he can establish that the Government intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key Government witness at the trial, including evidence concerning "any understanding or agreement as to a future prosecution" between the witness and the Government. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1964); *United States v. Newman*, 476 F.2d 733, 737-38 (3d Cir. 1973); *United States v. Kaplan*, 470 F.2d 100 (7th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973).

It is apparent in this case that the Assistant United States Attorney sat silently by while Ms. Johnson gave testimony on cross-examination which at least gave the court and jury an impression directly contrary to what he ultimately stated was the truth concerning his agreement with Ms. Johnson.[7] While she was testifying that she had no "agreements or understandings" with the Government, had not been "promised any help" in her pending cases, and that she did not expect anyone from the Government to appear at her state court sentencing appearance, the U.S. Attorney later admitted that he had promised that "we would do anything, whatever we could" to get her sentence minimized "to give her a break for what she has been able to do."

The Government contends, however, that it had no obligation to "correct" Ms. Johnson's testimony because it believed that she was answering the questions of defense counsel in good faith. It contends that although she was told that her cooperation would be made known to the state

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7. We must accept as true the admission of the U.S. Attorney made to the court at side-bar, since he does not deny the truth of this admission on appeal. *See* Giglio v. United States, 405 U.S. at 153. We note, however, that Mr. Wochok, whom he also implicated in the deal with Ms. Johnson, denied under oath that he had agreed to anything. *See* note 9, *infra*.

court at the time of her sentencing, she was also repeatedly told that "the Government can't promise you anything." Although this latter phrase clearly referred to the Government's inability to promise Ms. Johnson any particular *result* at her sentencing, the Government contends that it was upon this phrase that she relied in good faith to deny, inter alia, that she had any "agreements or understandings" with the Government. Since Ms. Johnson therefore did not have the intent to lie which is necessary for a perjury conviction, the argument runs, the Government had no duty to correct the testimony even if the testimony misled the court, defense counsel, and jury into believing that the Government had not even promised to *help* her at sentencing.

Arguably, of course, Ms. Johnson did not commit perjury by her responses to defense counsel. She might have believed in good faith that "agreements or understandings" only referred to specific promises concerning her sentence, which the Government could not and did not make. She might also have honestly believed, despite the Government's promise as described by the U.S. Attorney, that no one would appear on her behalf at the state proceeding. Finally, the U.S. Attorney's admission could be construed as a promise based solely upon Ms. Johnson's past behavior, "for what she *has been able* to do," and not to be affected by her future testimony in the instant case. Under this interpretation, her testimony would not technically be perjury since she had no intent to lie.

We do not believe, however, that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury. Regardless of the lack of intent to lie on the part of the witness, Giglio and Napue require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense

counsel, and ferret out ambiguities in his witness' responses on cross-examination. However, when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury.

These considerations are especially strong in the instant case. Defense counsel were attempting, by phrasing their questions as broadly as possible, to determine whether a prosecution witness had been promised anything in exchange for her testimony. Only the Government knew, by virtue of its former statements to her, that she was likely to narrowly construe the word "promise" to refer only to a promise of a particular sentence in the state proceeding. Defense counsel had every expectation that she would construe the word "promise" in its natural sense to include a promise by the Government to help her in the state proceeding. Under these circumstances, the Government may not sit back and require defense counsel to examine each witness extensively to determine whether that witness has been conditioned by the Government to give any particular word an unusual meaning.

Notwithstanding the Government's breach of its duty to disclose a promise made to a Government witness, the convicted defendant is entitled to a new trial only if the false testimony denying the existence of an agreement could "in any reasonable likelihood have affected the judgment of the jury." *Giglio, supra*, 405 U.S. at 154; *United States ex rel. Dale v. Williams*, 459 F.2d 763, 767 (3d Cir. 1972). This factor is dependent upon the relative importance of the witness' testimony to the Government's case. *Id.*

The defendants in this case have met their burden of showing the significance of the Johnson testimony to the Government's case against them. The Government does not seriously dispute the importance of this testimony, and this is confirmed by the testimony described in the district court

opinion in this case. *See* 368 F. Supp. at 700-703.[8] Nor do we believe that the impeachment of Ms. Johnson's credibility on other grounds by defense counsel sufficiently mitigated the prejudice to defendants which might have arisen had they been unable to show the agreement made between her and the Government. *See Napue, supra*, 360 U.S. at 270; *United States v. Kaplan, supra*, 470 U.S. at 103.

Had the Government not disclosed the agreement with Ms. Johnson until after the conclusion of the trial, these considerations would *impel us to reverse the* convictions of the defendants. In the instant case, however, the Government did in fact disclose the existence of the agreement. Although the disclosure was not made in a timely fashion, i.e., while Linda Johnson was still on the stand, the disclosure was made two days later, on the fourth day of the eleven day trial, while the prosecution was still presenting its case in chief.

As we have noted, the district judge was quite willing, in light of the belated "revelation" by the Government, to permit defense counsel extra latitude in their conduct of the defense, agreeing with defendants that the prosecutor's suggested stipulation was inadequate. The court explicitly told counsel that they would be permitted to ask leading questions concerning the agreement. Additionally, as noted by the district court in its opinion denying defendants a new trial, "Linda Johnson was subject to extensive cross-examination and to recall at any time by defense counsel for the purpose of exploring this alleged agreement and bringing same to the attention of the jury." 368 F. Supp. at 714. Furthermore, there is no doubt that defense counsel could have put Mr. McBride himself on the stand and examined him concerning the agreement, since there is no doubt that the prosecutor "possesse[d] information vital

8. In moving that the court place Ms. Johnson in protective custody, Mr. McBride stated in an affidavit dated May 26, 1973, (less than a month before the trial began) that "her testimony comprises at least seventy-five per cent of the Government's case."

to the defense." *See United States v. Newman*, 476 F.2d 733, 738 (3d Cir. 1973).

Defense counsel, on the other hand, chose to do nothing of the sort. In fact, the record is bare of any effort whatever on their part to disclose to the jury the agreement with Ms. Johnson, acknowledged at side-bar by Mr. McBride. Counsel did not recall Ms. Johnson as a witness and did not call Mr. McBride to testify. This deliberate inaction by defense counsel persisted even after they elicited from Mr. Wochok testimony that he could not say that his state prosecutor's office would not oppose leniency for Ms. Johnson in the state proceeding, in contradiction to the admission by Mr. McBride.[9] The record does not reveal that defendants even submitted to the jury the proffered stipulation by Mr. McBride.

We believe that this inactivity by defense counsel following the "revelation" by the Government constitutes a waiver of their right to allege error on appeal. As we have repeatedly stated:

> "* * * [I]f appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection *and seek corrective action by the Court*. [Citing cases.] He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create."

United States v. Chicarelli, 445 F.2d 1111, 1116 (3d Cir. 1971), *quoting from United States v. Grosso*, 358 F.2d 154, 158 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968). [Emphasis supplied.]

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9. Mr. Wochok stated that the only understanding was that "sentence [on the state charges] would be deferred and an opportunity would be given to the Government to explain to the Court the degree of her cooperation."

In this case, counsel did express his indignation at the Government's conduct but made no specific motion. The court stated in reply that "If there is any kind of motion you have made, . . . it is denied." Notwithstanding this cryptic comment, the court had previously expressed to defense counsel a willingness to take remedial action. Defense counsel did nothing to "seek corrective action by the Court" in order to minimize any prejudice to the defense.

We do not believe the Government's conduct in this case constituted per se reversible error. Although the judge plays a vital role in the trial of a criminal case, counsel for the parties are also essential components.[9a] They too share in the cause of justice. When error appears in a trial and counsel have opportunity to attempt to eradicate it but choose not to do so, they may not unload the burden of the error upon the trial judge. Defense counsel sat by in this case day after day without making the slightest effort to minimize the prejudice of which they now complain. The Government was slow in correcting the testimony of its key witness. Defense counsel, however, in the expectation that any ensuing conviction would be reversed, did nothing to take obvious corrective measures. We do not believe they may now profit from their inactivity and contend on appeal that the defendants are entitled to a new trial.[10]

9a. *See* ABA Standards Relating to the Defense Function §1.1(a) (Approved Draft 1971).

10. We are aware of Nash v. Illinois, 389 U.S. 906 (1967) (opinion by Mr. Justice Fortas, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, dissenting from the denial of certiorari). In that case, the defendant had been convicted of murder largely on the testimony of Triplett, who had denied being promised anything in exchange for his testimony. The prosecutor, knowing this denial was false, said nothing. Later in the trial, defense counsel called Triplett's lawyer as well as the prosecutor, both of whom admitted that Triplett had been promised leniency in exchange for his testimony.

Mr. Justice Fortas, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, stated that he "would grant certiorari and reverse." His first reason for reversing was that the defendant was prejudiced because the subsequent admission "might not ade-

This is not to say that counsel, had they exercised their best efforts, would in all certainty have been able to minimize the prejudice to defendants to such a degree that reversible error could have been eliminated. We recognize the strategic importance to defense counsel of being able to impeach the credibility of a key Government witness while he is still on the stand, rather than by recalling him after the jury has possibly accepted the truthfulness of his statements. We are unable to say, however, that there is *nothing* that defense counsel could have done to overcome or reduce the alleged prejudice so as to secure a fair trial for their clients. Counsel by various defense tactics possibly could have succeeded in so reducing the prejudice to their clients. Had they taken these steps, we would now be in a position to evaluate the presence, if any, of the residual prejudice and its effect upon the fairness of the trial. Absent such effort, we conclude that defendants waived their objections to the possible prejudice from the Government's action.

Note 10—*Continued*

quately overcome the jury's initial impression of the [Triplett] testimony." Our holding in the instant case is fully consistent with this rationale, because defense counsel in *Nash* attempted to reduce the prejudice to their client but arguably failed in this difficult task. We recognize the possible prejudice to defendants in the instant case, but hold that their failure to attempt to overcome the prejudice constitutes a waiver.

Mr. Justice Fortas' second reason for reversing was that "it is by no means clear" that the defendant must show prejudice from such prosecutorial misconduct, "especially in a capital case." To the extent that this means that even in a non-capital case the prosecutor's belated disclosure constitutes per se reversible error despite succeeding inaction by defense counsel, we respectfully disagree. We note further that the prosecutorial misconduct in the instant case was not as offensive as that in *Nash*, where the prosecutor admitted the agreement only when forced to under oath. Here, Mr. McBride voluntarily made the admission before Ms. Johnson's denials of any agreement had been contradicted by any witness.

We find support for this view in *United States v. Cerone*, 452 F.2d 274 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). In that case defendants contended, inter alia, that they had been prejudiced at trial by the testimony of the United States Attorney, who testified that a key witness had told him that he was afraid of "those fellows," referring to the defendants. The defense contended on appeal that it was prejudiced by the failure of the United States Attorney to identify which, if any, of the defendants the witness had feared. The court held that the defendants "waived that issue by failing either to cross-examine the United States Attorney or to call [the witness] in surrebuttal on that point." 452 F.2d at 288-89. *See also United States ex rel. Felton v. Rundle*, 410 F.2d 1300 (3d Cir. 1969) (en banc), *cert. denied*, 397 U.S. 993 (1970); *United States v. Cook*, 432 F.2d 1093, 1100 (7th Cir. 1970), *cert. denied*, 401 U.S. 996 (1971); *Bohol v. United States*, 227 F.2d 330 (9th Cir. 1955).

We have considered the other contentions of the defendants and find them without merit.[11]

The judgments of the district court will be affirmed.

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11. Defendants contend, inter alia, that (1) the district court erred in failing to give an accomplice charge concerning Linda Johnson; (2) the statement by a prosecution witness that he had once arrested one of the five co-defendants was so prejudicial as to warrant a new trial; (3) defendant Harvey Johnson was entitled to a severance of his trial from that of the remaining defendants; (4) a new trial should be granted because the prosecutor allegedly induced a Government witness to violate a sequestration order.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-2040, 73-2041

UNITED STATES OF AMERICA

v.

CHARLES HARRIS and HAROLD YOUNG

Nos. 73-2042, 73-2043, 73-2046, 73-2045

UNITED STATES OF AMERICA

v.

ALVIN E. YOUNG, HARVEY JOHNSON, ROBERT GREEN, CHARLES HARRIS, HAROLD E. YOUNG, and JAMES H. SIMMONS

Harvey Johnson,
Appellant in No. 73-2042

Alvin E. Young
Appellant in No. 73-2043

Harold E. Young
Appellant in Nos. 73-2040, 2045

Charles Harris
Appellant in Nos. 73-2041, 2046

Before BIGGS, ALDISERT and ROSENN, *Circuit Judges*

OPINION SUR PETITION FOR REHEARING

(Filed July 12, 1974)

ROSENN, *Circuit Judge*.

The dissent sur denial of the petition for rehearing would reverse on the ground that the prosecution must inform the fact finder as well as the court and defense counsel of the truth. This requirement appears to have been met in the instant case, however, by the prosecutor's proffered stipulation during the Government's case in chief as to the facts he admitted to the court and to counsel. This stipulation could also have been submitted to the jury if defense counsel so desired.

The dissent views the trial judge's statement that he would deny a defense motion as effectively foreclosing the defendants from any significant means of relief. The trial judge, however, was apparently referring to a motion for mistrial. As we have indicated in our original opinion, he was not precluding the defense from other remedies which were readily available to them.

For an example of measures by defense counsel to reduce prejudice resulting from the prosecution's belated disclosure of a bargain with a key witness, *see United States v. Johnson*, 487 F.2d 1318, 1322-24 (5th Cir. 1974), *petition for certiorari filed*, 42 U.S.L.W. 3542 (U.S. March 26, 1974) (No. 73-1418).

SEITZ, *Chief Judge*, dissenting sur denial of petitions for rehearing in banc.

I believe that these matters should be reheard by the Court in banc and the judgments of the district court reversed. The disposition of these appeals depends on our resolution of a question I consider to be of exceptional importance within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure: what is the scope of

a federal prosecutor's duty to correct known misstatements of government witnesses?

The prosecutor here knew at the time the testimony was given, on two consecutive days, that it was untrue. His only effort to correct the misstatement was his revelation of the testimony's untruth to the judge and defense counsel out of the jury's presence. Neither the prosecutor nor the district court ever brought the error to the jury's attention.

The panel, however, holds that once defense counsel was aware of the misstatement, responsibility for taking corrective measures was defendants' and their failure to take such corrective measures constituted a waiver of their right to assert this error. Because the prosecutor did not inform defense counsel that the testimony was false until after the witness involved had left the stand and another witness had taken it, defense counsel had no expeditious means of bringing this development to the jury's attention without the court's or the government's assistance. Certainly, the trial judge's statement that he denied any motion defense counsel was making concerning this matter may be viewed as effectively foreclosing any means by which defendants, without a considerable lapse of time and possibly significant injury to the presentation of their case, could have corrected this error.

While I disagree with the panel as to whether the defendants here reasonably could be expected to have corrected the misstatement, that is not what makes this case appropriate for rehearing. The important question is why defendants are required to bring the witness' misstatement to the jury's attention. I believe the panel in placing this burden on defendants was guided by a conception of the defendants' rights and prosecutor's duty that differs fundamentally from my own.

The sole right involved here is defendants' right to a fair trial implicit in the guarantee that no person shall be deprived of liberty without due process. Prosecutors,

as well as courts,[1] are under a general duty to insure that criminal defendants enjoy this right. As part of this general duty, and not as independent technical requirements, prosecutors are barred from employing false testimony to obtain convictions, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and are required, upon request, to make exculpatory evidence available to defendants, *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's " 'responsibility and duty to correct what he knows to be false and elicit the truth,' " *Napue v. Illinois*, 360 U.S. 264, 270 (1959), derives from the same source. *Napue* does not permit the prosecutor to fulfill this duty by telling defense counsel that certain testimony was false. The decision requires the prosecutor to correct the error, which can be done only by informing the fact-finder of the truth: the requirement that a prosecutor "elicit the truth" to "correct what he knows to be false" is a meaningless inconsistency unless the prosecutor must elicit the truth before the jury. If he fails to do so to remedy a material statement he knows to be false, the prosecutor has violated his duty to insure defendants a fair trial. I do not see how defense counsel's failure to correct testimony known to the prosecutor to be false can waive defendants' right to a fair trial; and I find the conclusion of waiver here particularly baffling in light of the established rule that every reasonable presumption should be indulged against waiver of the right to a fair trial, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970); *Brookhart v. Janis*, 384 U.S. 1, 4

1. By focusing on the prosecutor's duty to assure defendants a fair trial, I do not intend to de-emphasize the court's duty in this regard. The district court had a duty to see that the jury was made aware of the prosecutor's promise to the witness. The initial responsibility for correcting this error, however, was on the prosecutor, for he, not the judge and not defendants or their counsel, knew when the testimony was given that it was false. The court's failure to fulfill its duty here does not excuse the prosecutor's initial or subsequent dereliction.

(1966); *cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The solution reached by the panel encourages game-playing by government attorneys; I would rather we *encouraged* them *to preserve* defendants' right to a fair trial.

Judge Gibbons and Judge Weiss join in this dissent.

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